

TULANE MARITIME LAW JOURNAL ONLINE

VOLUME 42

MAY 2018

Tension Leg Offshore Oil Platform Vessel Status and the OCSLA Substantial Nexus Test in *Baker v. Director, Office of Workers' Compensation Programs*

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I. INTRODUCTION

A marine carpenter constructing housing modules to be assembled on a deep water drilling facility was injured and left without maritime protection.¹ James Baker was employed to support Big Foot, a tension leg offshore oil platform (TLP).² Big Foot is a structure capable of floating, is incapable of self-propulsion, and lacks a steering mechanism, a raked bow, and thrusters for self-positioning.³ The TLP was not meant to regularly transport goods or people.⁴ In order for Big Foot to reach its drilling location, it had to be towed to a position more than two hundred miles off the coast of Louisiana.⁵ This TLP, once brought to its drilling location, had to be anchored to the seabed with over sixteen miles of tendons so that it could safely extract oil resources for twenty years or more.⁶ A crew was required to man Big Foot for the duration of the tow to ensure it arrived safely.⁷ Baker was allegedly injured while constructing living quarters destined for Big Foot.⁸ He filed a claim under the Longshore and Harbor Worker's Compensation Act (LHWCA), asserting he is a covered employee as a shipbuilder for his land-based injury, and

1. Baker v. Dir., Office of Workers' Comp. Programs, 834 F.3d 542, 545, 2016 AMC 2568, 2569 (5th Cir. 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*, 2016 AMC at 2570.

7. *Id.*, 2016 AMC at 2569-70.

8. *Id.*

alternatively claiming he is a covered employee by the LHWCA as extended by the Outer Continental Shelf Lands Act (OCSLA).⁹

Reviewing Baker's claim, the Administrative Law Judge (ALJ) held a formal hearing on Baker's disability claims and denied him benefits.¹⁰ The ALJ found that Big Foot was not a vessel under the LHWCA, and, therefore, Baker was not engaged in maritime employment as a shipbuilder.¹¹ Analyzing the alternative argument, the ALJ found that Baker's claim for protection under the LHWCA, as extended by OCSLA, failed because there was no significant causal link between Baker's injury and the extraction efforts of natural resources on the TLP.¹² Baker appealed this decision to the Benefits Review Board (BRB).¹³ The BRB affirmed the ALJ's decision.¹⁴ He then timely filed a petition for review with the United States Court of Appeals for the Fifth Circuit.¹⁵ The United States Courts of Appeals for the Fifth Circuit *held* that a TLP is not a vessel, and, therefore, Baker is not covered under LHWCA; and, in analyzing the alternative argument, an injury in relation to building housing units to be placed on the TLP is not substantially related to extraction operations of natural resources on the Outer Continental Shelf (OCS).¹⁶ *Baker v. Director, Office of Workers' Compensation Programs*, 834 F.3d 542, 547, 549, 2016 AMC 2568, 2574, 2576 (5th Cir. 2016).

II. HISTORICAL BACKGROUND

The LHWCA provides federal workers' compensation benefits to certain maritime workers and their families when the workers are injured within the course of their employment.¹⁷ Initially, the LHWCA provided coverage only to workers whose injuries took place on navigable waters.¹⁸ Under this enactment, the LHWCA did not cover workers injured while

9. *Id.*

10. *Id.*, 2016 AMC at 2570.

11. *Id.*; *see also* 1 U.S.C. § 3 (2012); *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 2013 AMC 1 (2013); *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 2005 AMC 609 (2005).

12. *Baker*, 834 F.3d at 545, 2016 AMC at 2569.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 549, 2016 AMC at 2576.

17. 33 U.S.C. §§ 901-03 (2012); *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 94, 1994 AMC 1817, 1819-20 (1994).

18. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46-48, 1989 AMC 2965, 2968-68 (1989); *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Perini N. River Assocs.*, 459 U.S. 297, 313-14, 1983 AMC 609, 621-623 (1983).

engaged in employment on land.¹⁹ Due to the nature of longshoring operations, employees are typically required to operate on water and on land. In light of this, Congress amended the LHWCA in 1972 to also include those injuries of individuals who were operating on adjoining lands that are commonly used for maritime purposes.²⁰ The amended LHWCA required that those employees who were not on navigable waters be, additionally, engaged in maritime employment (status requirement).²¹ The new status requirement extended coverage to “any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, a ship builder, and ship-breaker.”²² Additionally, the Supreme Court of the United States held that any occupation that “entails activities that are an integral or essential part of the loading, unloading, building, or repairing of a vessel” fulfills the status requirement.²³ However, the LHWCA does not meaningfully provide a definition for vessel.²⁴ The Supreme Court incorporated the definition within the Rules of Construction Act, 1 U.S.C. § 3 as the definition of vessel,²⁵ which provides: “vessel includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”²⁶ Because of this incorporation, jurisprudence interpreting 1 U.S.C. § 3 also applies to the LHWCA.²⁷

The Supreme Court has stated “used, or capable of being used, as a means of transportation on water” is the essential language of 1 U.S.C. § 3 and that the watercraft need not be primarily used for transportation on water.²⁸ It has also noted that the ability to transport must be more than theoretical; the ability to transport must be practical.²⁹ Another requirement of a vessel is that a reasonable observer, looking at the structure’s physical characteristics and activities, must consider the

19. *Chesapeake*, 493 U.S. at 46, 1989 AMC at 2969; *Perini*, 459 U.S. at 314-315, 1983 AMC at 621-623.

20. 33 U.S.C. § 901 *et seq.* (1970) (amended 1972); *Chesapeake*, 493 U.S. at 46, 1989 AMC at 2969; *Perini*, 459 U.S. at 299, 1983 AMC at 610; *Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 431, 2009 AMC 188, 194 (5th Cir. 2009).

21. *Perini*, 459 U.S. at 299, 1983 AMC at 610; *Hudson*, 555 F.3d at 431, 2009 AMC at 194.

22. 33 U.S.C. § 902(3) (2012).

23. *Hudson*, 555 F.3d at 439, 2009 AMC at 206-07.

24. 33 U.S.C. § 902(3)(G); *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 488-89, 2005 AMC 609, 620 (2005).

25. *Dutra*, 543 U.S. at 488-89, 2005 AMC at 613-614.

26. 1 U.S.C. § 3.

27. *Dutra*, 543 U.S. at 492, 2005 AMC at 616.

28. *Id.* at 495, 2005 AMC at 618.

29. *Id.* at 496, 2005 AMC at 619.

structure to be practically capable of carrying things over water.³⁰ The Supreme Court has described that if a ship has a combination of these features then the structure is not practically capable of transportation: no rudder or other steering mechanism, an unraked hull, and a rectangular bottom ten inches below the water.³¹ The Court has also maintained that not every floating structure is a vessel.³² The lack of self-propulsion is not dispositive.³³ The Supreme Court has held that a watercraft is not capable of transportation if it is permanently moored to the ocean bed, and that a vessel cannot move in and out of protection because of its state of transit at the time of an accident.³⁴ The Fifth Circuit has held that if the structure operates as a work platform, it is unlikely that it is capable of transportation.³⁵ The Fifth Circuit has also instructed courts to consider the intended purpose of the structure; if transportation is incidental to its ultimate purpose, then the structure cannot be a vessel.³⁶

The Outer Continental Shelf Lands Act (OCSLA) states that “disability or death of an employee resulting from any injury occurring as a result of operations conducted on the outer Continental Shelf for the purpose of exploring, developing, or transporting by pipeline the natural resources...of the subsoil and seabed of the outer Continental Shelf” shall result in compensation paid “under the provisions of the [LHWCA] [33 U.S.C. §§ 901 *et seq.*].”³⁷ Three courts of appeal have adopted three different tests for determining whether an injury occurs “as a result of operations” on the OCS, and a fourth test was advanced by the Solicitor General.³⁸ One test, espoused by the Third Circuit, was a “but for” causation test.³⁹ Another test, as developed by the Fifth Circuit, only permitted recovery for injuries which occurred on the OCS platform or above the waters of the OCS platform.⁴⁰ The Solicitor General’s test would result in LHWCA coverage for all injuries suffered by employees of companies engaged in resource extraction on the OCS and the off-OCS

30. *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 121, 2013 AMC 1, 5-6 (2013).

31. *Id.* at 121-22, 2013 AMC at 6.

32. *Id.* at 121, 2013 AMC at 5.

33. *Id.* at 122, 2013 AMC at 6.

34. *Dutra*, 543 U.S. at 497, 2005 AMC at 620.

35. *Bernard v. Binnings Const. Co.*, 741 F.2d 824, 832, 1985 AMC 784, 797 (5th Cir. 1984); *Smith v. Massman Const. Co.*, 607 F.2d 87, 89, 1980 AMC 1349, 1352 (5th Cir. 1979).

36. *Smith*, 607 F.2d at 89, 1980 AMC at 1351-52.

37. 43 U.S.C. § 1333(b) (2012).

38. *Pac. Operations Offshore, LLP v. Valladolid*, 565 U.S. 207, 213-14, 2012 AMC 1, 5-6 (2012).

39. *Valladolid*, 565 U.S. at 213, 2012 AMC at 5.

40. *Id.*, 2012 AMC at 5-6.

injuries of employees who spend a substantial portion of their worktime on the OCS engaging in extraction operations.⁴¹ The final test proposed by the Ninth Circuit, which was adopted by the Supreme Court, is a substantial nexus test, which according to Justice Scalia has no pedigree and is entirely different than proximate cause.⁴² The test is whether there is a significant causal link between the injury that the worker suffered and the employer's on-OCS operations conducted for the purpose of extracting natural resources from the OCS (extractive operations).⁴³ The Supreme Court in *Pacific Operations Offshore, LLP v. Valladolid* stated this test is to be applied by the ALJs and courts as they define substantial nexus because they are capable of determining its meaning.⁴⁴

To understand the substantial nexus test in relation to "on-OCS extractive operations," it is important to understand the statutory definitions of exploring, development, and production as provided within OCSLA. Exploration means "the process of searching for minerals, including geophysical surveys . . . and . . . any drilling."⁴⁵ The term development means "those activities which take place following discovery of minerals . . . including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered."⁴⁶ The term production is defined as "those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling."⁴⁷

III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the Fifth Circuit held that a TLP is not a vessel and, in the alternative, that off-OCS construction of dining and housing modules for a TLP does not bear a sufficiently substantial nexus to on-OCS extractive operations to trigger LHWCA coverage under OCSLA.⁴⁸ The court came to this decision by

41. *Id.* at 214, 2012 AMC at 6.

42. *Id.* at 222, 2012 AMC at 13-14; *id.* at 224, 2012 AMC at 16 (Scalia, J., concurring in part and concurring in judgment).

43. *Id.* at 222, 2012 AMC at 13-14.

44. *Id.*, 2012 AMC at 13.

45. 43 U.S.C. § 1331(k) (2012).

46. *Id.* § 1331(l).

47. *Id.* § 1331(m).

48. *Baker v. Dir., Office of Workers' Comp. Programs*, 834 F.3d 542, 549, 2016 AMC 2568, 2576 (5th Cir. 2016).

determining that a TLP is a structure which operates as a platform and any transportation or navigation occurring is incidental to its primary use of being moored to the seabed floor and extracting natural resources.⁴⁹ In the alternative, the Fifth Circuit held the injury is too attenuated from resource extraction by determining that constructing dining and housing modules does not require any of the following: traveling to the OCS, assembling the modules onto the TLP, moving the TLP, operating on the TLP once the TLP is in position on the OCS.⁵⁰

First, the Fifth Circuit analyzed the coverage of the LHWCA.⁵¹ It determined that, though initially, the LHWCA only protected injuries on navigable waters, it was expanded to include maritime activities occurring on land near water.⁵² Under this expanded coverage, the court found that to be covered under LHWCA employees must meet both a maritime situs and maritime status requirement.⁵³ The parties' stipulation that the claimant met the situs requirement was accepted by the court, and, thus, this requirement was not analyzed.⁵⁴

In analyzing the status requirement, the Fifth Circuit stated a claimant must be a maritime employee as defined by 33 U.S.C. § 902(3) and an expansion of the statute as interpreted by the Supreme Court.⁵⁵ The court, relying on its own authority interpreting § 902(3), determined that a "maritime employee" is a ship repairman, shipbuilder, ship breaker, or any other occupation that involves activities integral or essential to loading, unloading, building, or repairing a vessel.⁵⁶ The court then explained that whether the claimant was covered by the LHWCA depended on whether the claimant was working on a vessel.⁵⁷ In defining "vessel," the court relied on the Supreme Court in *Stewart v. Dutra Construction Co.* which incorporated 1 U.S.C. § 3.⁵⁸

Next, relying on *Dutra*, the court determined that a vessel must be capable of being used as a means of transportation.⁵⁹ It extrapolated from

49. *Id.* at 547-48, 2016 AMC at 2574-75.

50. *Id.* at 548-49, 2016 AMC at 2575-76.

51. *Id.* at 545, 2016 AMC at 2571.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 546, 2016 AMC at 2571; *see Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 2009 AMC 188 (5th Cir. 2009).

56. *Baker*, 834 F.3d at 546, 2016 AMC at 2571.

57. *Id.*

58. *Id.*, 2016 AMC at 2572 (citing *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 488-90, 2005 AMC 609, 614 (2005)).

59. *Id.*

Lozman that a reasonable observer must determine from the structure's physical characteristics and activities whether the structure is capable of transporting crew or cargo.⁶⁰ The court also understood *Lozman* to mean there is a practical concern of transportation, meaning a structure must be *regularly* used as a means of transportation and not simply be capable of being used as a means of transportation.⁶¹ The court explained that a lack of rudder, an unraked hull, a rectangular bottom ten inches below the water, a lack of ability to generate or store electricity, a lack of self-propulsion, and non-maritime living quarters are all characteristics of non-vessels.⁶² Citing previous Fifth Circuit decisions, the court further explained that a structure which is intended to operate as a work platform, is not designed for navigation, or incidentally carries cargo or crew in pursuit of its primary purpose is not a vessel.⁶³

The Fifth Circuit then analyzed the functional purposes of Big Foot. It determined that the TLP is to be transported once, attached to the seabed for twenty years, and operate as a platform to extract natural resources.⁶⁴ Carrying cargo or crew is only incidental to its purpose.⁶⁵ In addition, it has several characteristics are indicative of a non-vessel status: a lack of rudder, an unraked hull, a lack of self-propulsion, and a rectangular bottom ten inches below the water.⁶⁶

The panel subsequently analyzed the coverage provided by OCSLA through the LHWCA.⁶⁷ The court found OCSLA extends coverage to "injur[ies] occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the outer Continental Shelf."⁶⁸ In defining "as a result of," the court determined a "but-for" test is to be rejected.⁶⁹ It determined there must be a substantial nexus, or a significant causal link, between the claimant's injury and the on-OCS extractive operations.⁷⁰ Finally, the panel held that the claimant's job occurred solely on land, was geographical distant from the OCS and

60. *Id.* at 546-47, 2016 AMC at 2572-73.

61. *Id.* at 547, 2016 AMC at 2573.

62. *Id.*

63. *Id.* at 547-48, 2016 AMC at 2574-75.

64. *Id.*, 2016 AMC at 2573-74.

65. *Id.*

66. *Id.* at 548, 2016 AMC at 2574.

67. *Id.*, 2016 AMC at 2575.

68. 43 U.S.C. § 1333(b) (2012).

69. *Baker*, 834 F.3d at 548, 2016 AMC at 2576.

70. *Id.*, 2016 AMC at 2575.

its operations, and did not take part in moving Big Foot to, installing it on, or operating the TLP on the OCS.⁷¹

IV. ANALYSIS

From analyzing well-settled case law in defining a vessel under 1 U.S.C. § 3, Big Foot is not a vessel under general maritime law and therefore not a vessel under the LHWCA. However, in analyzing OCSLA coverage under the substantial nexus test, it is uncertain whether the Fifth Circuit reached the right decision or if it did for the right reasons.

As noted in *Valladolid*, “employees injured while performing tasks on the OCS will regularly satisfy the [substantial nexus] test[;] whether an employee injured while performing an off-OCS task qualifies . . . is a question that will depend on the individual circumstances of each case.”⁷² Few courts have analyzed the substantial nexus test and its scope.⁷³ Therefore, one must look to the few cases which have advanced through the administrative levels of the LHWCA and the sole decision from a federal district court.⁷⁴

In *Mays v. Chevron Pipe Line Co.*, the United States District Court for the Western District of Louisiana evaluated a motion for reconsideration involving the injury of a worker on a platform 2.9 miles off the coast of Louisiana.⁷⁵ The worker manually closed a valve transporting natural gas by pipeline from an OCS facility, injuring himself.⁷⁶ The court reversed itself, granted the motion for reconsideration, and left the substantial nexus determination to be made to the subsequent trier of fact, reasoning that valve maintenance arguably meets the test.⁷⁷

In *Flores v. MMR Constructors, Inc.*, the ALJ reviewed whether an electrician’s injury occurring during the inspection of Big Foot’s wiring while the structure was floating on pontoons in Corpus Christi satisfied

71. *Id.*

72. *Pac. Operations Offshore, LLP v. Valladolid*, 565 U.S. 207, 222, 2012 AMC 1, 13 (2012).

73. Brief for the Federal Respondent at 26, *Baker*, 834 F.3d 542, 2016 AMC 2568 (5th Cir. 2016) (No. 15-60634).

74. *See Valladolid*, 565 U.S. at 222, 2012 AMC at 13; Brief for the Federal Respondent at 26, *Baker*, 834 F.3d 542, 2016 AMC 2568 (5th Cir. 2016) (No. 15-60634).

75. *Mays v. Chevron Pipe Line Co.*, No. CV 14-3098, 2017 WL 129899, at *1, 2017 U.S. LEXIS 4381, at *13-14 (W.D. La. Jan. 10, 2017). The main issue of this case was whether the defendants could invoke the statutory employer provisions of the Louisiana Workers’ Compensation Act and avoid a claim by the employee for federal compensation under OCSLA.

76. *Id.*

77. *Id.* at *5, 2017 U.S. LEXIS, at 15-16.

the substantial nexus test.⁷⁸ The electrician injured his Achilles tendon when his foot was caught under a door.⁷⁹ The ALJ found the inspection work lacked a significant link to OCS extraction operations, reasoning the actions of the inspector may meet the definition of development within the statute, but meeting the definition of development does not dictate an injury occurred as a result of actual on-OCS extractive operations.⁸⁰

In *Boudreaux v. Owensby & Kritikos, Inc.*, the BRB considered whether an injury resulting from a car accident was substantially related to on-OCS extractive operations.⁸¹ In the normal course of events, the employee was an Advanced/Automated Ultrasonic Testing field supervisor who tested and evaluated tanks on off-shore oil platforms located on the OCS.⁸² The employee was carrying his equipment and was on his way from his home in his personal vehicle to be picked-up at a dock to be transported off-shore.⁸³ The BRB affirmed the ALJ's judgment, stating that the injury was substantially related to the employer's on-OCS extractive operations because he was injured in the regular course of employment and his role directly furthered on-OCS operations.⁸⁴ The BRB reasoned that claimants may establish a substantial nexus between their injury and operations by showing their work directly furthers OCS operations and is in the regular course of such operations; the BRB explained that the test is whether the usual work furthers operations, not whether the employee was injured performing an activity that directly fosters OCS operations.⁸⁵

Conversely, in *Grabert v. Besco Tubular Services Co.*, the ALJ determined that a worker's car accident injury was not substantially related to on-OCS operations.⁸⁶ The employee was a tong operator and occasionally performed other duties related to the extraction of oil on the OCS.⁸⁷ The worker was on hire and on his way to work with his equipment in a vehicle to a dock to be transported off-shore.⁸⁸ The ALJ denied benefits reasoning the Supreme Court eliminated a status test and

78. 50-786 Benefits Review BD Longshore RPTR Statutes & Regs 6/16-1 (2015).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS 83 (Ben. Rev. Bd. 2015).

83. *Id.*

84. *Id.*

85. *Id.*

86. 50-786 Benefits Review BD Longshore RPTR Statutes & Regs 6/16-1 (2015).

87. *Id.*

88. *Id.*

directly chose a test which related the injury to the on-OCS operations.⁸⁹ The ALJ also reasoned that to allow an injury on land such as this would be to establish an eliminated “but-for” test, and stated that offshore activities must directly cause offshore injuries.⁹⁰ The case is currently pending before the BRB.⁹¹

Analyzing the ALJ, BRB, *Mays*, and *Valladolid* decisions does not aid in understanding the substantial nexus test. The ALJ and BRB did not apply the substantial nexus test. The substantial nexus test from *Valladolid* simply requires “the injured employee to establish a significant causal link between the injury that he suffered and his employer’s on-OCS operations conducted for the purpose of extracting natural resources from the OCS.”⁹² *Valladolid* settled after remand.⁹³

Despite the ALJ and BRB decisions in *Baker* suggesting that that the injury itself must bear a direct connection to OCS operations, the Fifth Circuit did not adopt this in its decision. In discussing “connection,” the ALJ stated that a mere indirect connection to an OCS facility, is not sufficient.⁹⁴ Specifically, “at the time of the injury there was no completed rig, much less a rig operating, installed or even in transit,” the claimant had “no role in the installation or operation of the rig,” and the living quarters the claimant was constructing that were to be used for the OCS facility “were not unique and were typical of living modules used for other purposes.”⁹⁵ The BRB affirmed, adding that the claimant’s “activities were geographically, temporarily, and functionally distant from operations conducted for the purpose of extracting natural resources from the outer continental shelf.”⁹⁶

There is a question of what a substantial nexus test entails and how to properly administer it. It is unclear whether the test is to be applied at the time of injury (time of injury test) or whether it should focus on the general job duties of the employee (job duties test). Additionally, there is a concern of whether the substantial nexus test extends coverage landward

89. *Id.*

90. *Id.*

91. *Id.*

92. *Pac. Operations Offshore, LLP v. Valladolid*, 565 U.S. 207, 222, 2012 AMC 1, 13 (2012).

93. Brief for the Federal Respondent at 27 n.16, *Baker v. Dir., Office of Workers’ Comp. Programs*, 834 F.3d 542, 2016 AMC 2568 (5th Cir. 2016) (No. 15-60634).

94. ALJ’s Decision and Order, *Baker v. Gulf Island Marine Fabricators*, Docket No. 2013-LHCA-1807, at 10 (Dep’t of Labor June 9, 2014).

95. *Id.* at 11.

96. *Baker v. Gulf Island Marine Fabricators*, No. 14-0344, at 10 (BRB July 14, 2015).

to functions which are not specific to the OCS or an OCS facility (auxiliary versus specific test).

The *Valladolid* Court focused on those injuries which were sustained while performing duties related to “on-OCS operations conducted for the purpose of extracting natural resources from the OCS.”⁹⁷ Additionally, the Court stated “we think that § 1333(b) should be interpreted in a manner that focuses on injuries that result from those operations.”⁹⁸ The *Valladolid* court rejects a situs-test.⁹⁹ Together, this suggests the test should focus on the work performed when the injury occurred. Whether the work must relate to extraction in a specific manner and not in an auxiliary manner is left for debate, as a significant link to on-OCS extractive operations is ambiguous.

The Fifth Circuit may have reached the correct conclusion but not for the right reasons. First, the Fifth Circuit compared Baker’s work to Valladolid’s work.¹⁰⁰ However, this comparison does not have merit, because it was never determined whether the worker in *Valladolid*, who spent 98% of his time on the facility and was injured on-land, fell within OCSLA coverage. Additionally, the *Baker* court’s analysis states the work “did not require . . . travel to the OCS at all, making his work geographically distant from the OCS . . . the company had no role in moving Big Foot to, installing Big Foot on, or operating Big Foot once placed on the OCS.”¹⁰¹ The test applied here is a duties test, which may contradict the focus of *Valladolid*.

The *Baker* ALJ and BRB application of the *Valladolid* test may be more faithful to the substantial nexus test. Their analyses depended more on the work being performed while injured, not the worker’s work in general: whether the facility was operating, whether the claimant had a role in installation or operation on the facility, whether the function was unique or specific to the OCS or OCS facilities,¹⁰² and whether the activities were geographically, temporally, or functionally related to extraction efforts on the OCS.¹⁰³ The Supreme Court considered but rejected a test based on the amount of time the employee spent on the OCS

97. *Valladolid*, 565 U.S. at 222, 2012 AMC at 13.

98. *Id.*

99. *Id.*

100. *Baker v. Dir.*, Office of Workers’ Comp. Programs, 834 F.3d 542, 549, 2016 AMC 2568, 2576 (5th Cir. 2016).

101. *Id.*

102. ALJ’s Decision and Order, *Baker v. Gulf Island Marine Fabricators*, Docket No. 2013-LHCA-1807, at 11 (Dep’t of Labor June 9, 2014).

103. *Baker v. Gulf Island Marine Fabricators*, No. 14-0344, at 10 (BRB July 14, 2015).

facility when the employee was injured on land.¹⁰⁴ Therefore, the substantial nexus should not consider the amount of time the worker spent on the OCS facility, which hints at the time of injury test and a rejection of a duties test. The time of injury test may be the proper evaluation mechanism in determining whether there is a significant link to the extractive operations of the facility.

There is then the question of what work is to be covered under OCSLA. First, a look at the statutory language: “disability or death of an employee resulting from *any injury* occurring *as a result of operations conducted* on the outer Continental Shelf for the purpose of *exploring for, developing, or transporting by pipeline* the natural resources . . . of the subsoil and seabed of the outer Continental Shelf.”¹⁰⁵ The language itself refers to protecting *any injury* which occurs as a result of operations on the OCS. This expansive language covers injuries which occurred performing integral natural resource extraction operations and individuals’ injuries which occurred performing an auxiliary, supportive duty related to resource extraction.

The definitions provided within the enactment further support coverage for both types of workers, those performing auxiliary duties and those performing specific duties.¹⁰⁶ Exploration limits coverage to injuries occurred in preliminary drilling; development limits coverage to injuries occurred in drilling and those injuries which occur on onshore support facilities; production is inclusive of broad categories, namely operation monitoring and maintenance. These statutory definitions expand OCSLA coverage to injuries in performance of auxiliary functions which enable the facility to fulfil its mission on the OCS. Alternatively, considering a “but-for” test was rejected, it may be that only those injuries in relation to operations which are specific to extraction and the OCS facility may fall within the purview of OCSLA.

The purpose of OCSLA was to extend federal jurisdiction over the subsoil, seabed, and submerged lands of the OCS of the United States, areas not previously covered by any workers’ compensation regime.¹⁰⁷ This may suggest only workers performing integral work to extractive operations should be covered, because state compensation statutes provide coverage for these other individuals.

104. *Pac. Operations Offshore, LLP v. Valladolid*, 565 U.S. 207, 214, 2012 AMC 1, 6 (2012).

105. 43 U.S.C. § 1333(b) (2012) (emphasis added).

106. *See id.* § 1331 (k)-(m).

107. *Id.* 1332.

There is great uncertainty in the application of the substantial nexus test. It leaves some workers with greater protections than others, even though they may both be working to support the same facility. Courts have little instruction regarding whether to focus on the time of injury or the workers' duties in applying the substantial nexus test. Moreover, there is no clarity regarding whether only workers who perform OCS and OCS facility specific functions can meet the substantial nexus test, or whether workers who perform general functions can as well.

Focusing on the location of the injury subverts Congress's mandate that OCSLA apply to all injuries occurring "as a result of" OCS activities. Focusing on the duties being performed is the more rational choice. OCSLA was intended to cover those individuals working on the subsoil, seabed, and submerged lands of the OCS; individuals performing functions not specific to the OCS or the operation of OCS facilities may expand OCSLA to areas it was not designed to cover. The substantial nexus test was designed to cover injuries with a significant link to on-OCS operations, not general operations enabling OCS operations.

V. CONCLUSION

However ambiguous the substantial nexus test may seem in relation to OCSLA coverage, it can be easily understood once the purpose of its enactment is evaluated. The statute itself utilizes language which is broad in scope, namely "as a result of;" but the substantial nexus test denies a "but-for" causation standard and instead employs a significant link test comparing the worker's injury to the on-OCS operations which are performed for the purpose of extracting natural resources. Although workers maybe employed to support the same structure, the coverage they are offered may differ based on the intent of the enactment and the requirement of the substantial nexus test. The remaining question is what constitutes specific to the OCS and OCS facilities.

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* © 2018 Eric A. Iamurri. Eric is a current JD/MBA student originating from the Philadelphia area. With heavy guidance from Arthur Crais, this is his case note.